Supreme Court, U.S.
FILED

041515 MAY 10 2005

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

EMR NETWORK,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Does the Federal Communications Commission have an affirmative duty to develop evidence and to supplement the record in a proceeding before it to avoid "acting ignorantly when intelligent action is possible" — as expressed in the Second Circuit landmark decision in *Scenic Hudson*?

2. Does the Congressional mandate to the Federal Communications Commission to act "in a manner consistent with the public interest" in the deployment of broadband and other advanced wireless services require the FCC to determine the effect of its actions on the environment and human health? (47 U.S.C. § 157)

3. Does the exclusive regulatory authority assigned to the Federal Communications Commission to set human exposure guidelines for RF Radiation — pre-empting all State and Local Governments — obligate the FCC to regularly review and update those guidelines? (47 U.S.C. § 332(c)(7)(B)(iv))

4. Does the National Environmental Policy Act (NEPA) impose a "continuing responsibility" on the FCC to use all practicable means to assure safe and healthful surroundings for all Americans when carrying out its statutory functions? (42 U.S.C. § 4331 *et seq.*)

List of Parties and Corporate Disclosure Statement

Petitioner is EMR Network, part of a 501(c)(3) non-profit corporation based in Montpelier, Vt. The EMR Network's Mission Statement, published on its website is as follows:

EMR Network Mission Statement

> We believe that electromagnetic radiation (EMR), which includes the extremely low frequencies (ELF), the radio frequencies (RF) and microwave (MW) radiation, may be hazardous to life and may constitute a significant threat to public health. This belief is based on credible research, spanning decades of scientific inquiry. Our mission is to enhance local, regional, national, and international efforts to reduce, mitigate, and where possible, eliminate hazardous exposure to EMR.
>
> We are committed to fostering the appropriate scientific research. Our charge is to educate the public, government officials and those in other scientific disciplines about the biological effects and environmental concerns associated with EMR.
>
> The EMR Network was created to provide a forum for effective and balanced information for citizen-action groups, the media, municipal agents, government officials and scientists alike.
>
> www.emrnetwork.org

Respondents are the Federal Communications Commission and the United States of America.

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Citations of Official and Unofficial Reports of Opinions and Orders Entered in the Case

The Order of The Federal Communications Commission, released August 14, 2003, denying petitioner's Application for Review, is reported in the FCC's electronic files as FCC 03-191, and is reproduced in the Appendix at pages A-1 through A-13.

The opinion of the Court of Appeals for the District of Columbia denying petitioner's Petition for Review, decided December 7, 2004, is reported at 391 F.3d 269; 364 U.S.APP.D.C. 20; 34 Envtl.L.Rep.20,148; and 34 Communications Reg. (P&F) 713, and is reproduced in the Appendix at pages A-15 through A-21.

The Order of the Court of Appeals, filed on February 11, 2005, denying petitioner's Petition for Re-hearing en Banc is reproduced in the Appendix at page A-23.

Basis for Jurisdiction in Supreme Court

The Judgment of the Court of Appeals sought to be reviewed was entered on December 7, 2004. The Order denying petitioner's Petition for Rehearing en Banc was entered on February 11, 2005. This petition for certiorari is filed within 90 days thereof.

The statutory provisions believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question are 28 U.S.C. Sections 1254 (1) and 2101.

Certiorari is appropriate under Supreme Court Rule 10(a) because a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter.

Statutes Involved in the Case

National Environmental Policy Act (NEPA)

42 U.S.C. § 4321. **Congressional declaration of purpose**

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4331. **Congressional declaration of national environmental policy**

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

2. assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4332. **Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

the environmental impact of the proposed action,

any adverse environmental effects which cannot be avoided should the proposal be implemented,

alternatives to the proposed action,

the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; ***

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information

useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter 11 of this chapter.

Telecommunications Act of 1996

47 U.S.C. § 157.

(a) In general. — The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 U.S.C. § 332(c)(7)(B)(iv)

No state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Statement of the Case

An agency of the United States Government is sponsoring a massive expansion of round-the-clock continuous exposure of the American people to radiation from wireless transmitters, in calculated and deliberate ignorance of the consequences and with reckless disregard of the known potential health effects — and making no distinction between the very young, the elderly, or the ailing among the universe of persons in the population.

The obvious common sense alternative to this know-nothing bureaucratic mindset is simple and inexpensive — to initiate independent, reliable scientific research into the biologic effects of 24/7 exposure to low-power ultra-high frequency wireless emissions on humans, domestic animals, plants and wildlife. So far, the agency has turned a deaf ear to all such suggestions, and the time has therefore come for this Court to remind the Commissioners and their staff of their legal responsibilities to the public.

Proceedings Below

EMR Network (EMR), a non-profit citizens organization concerned with the environmental effects of electromagnetic radiation, filed a petition with the Federal Communications Commission (FCC) dated September 25, 2001, requesting the Commission to inquire into the need for revising the FCC's RF Radiation Rules governing permissible levels of RF radiation from FCC-regulated transmitters. On December 11, 2001, the Acting Chief of the FCC's Office of Engineering & Technology (OET) issued a letter dismissing the EMR Petition for Inquiry pursuant to 47 CFR § 0.241. EMR then filed an Application for Review of the dismissal letter by the full Commission, pursuant to 47 CFR § 1.115, under date of January 10, 2002. On August 14, 2003, the Commission released its final Order upholding the dismissal of the EMR Petition. [FCC 03-191] (A-1 – A-13)

On October 3, 2003, EMR served and filed a timely Petition for Review of the FCC Order of August 14, 2003, by the Court of Appeals.

That court denied the Petition for Review on December 7, 2004. (A-15 – A-21) The petitioner then sought rehearing *en banc,* which was denied on February 11, 2005. (A-23)

Petitioner's standing is based on the fact that members of EMR Network are exposed to RF radiation and would benefit from the FCC's updating of its rules to provide them more protection. EMR was the original petitioner before the FCC and the Court of Appeals below.

The jurisdiction of the Court of Appeals was based on 28 U.S.C. §§ 2342-2344, 2349 and 47 U.S.C. § 402(a).

Factual Background

Over the past decade, the erection of mobile telecommunications transmitters across the U.S. has quite literally exploded as telecommunications companies have raced to control as much of the wireless market as possible. Transmitters have been installed on high-rise buildings and apartment houses in cities, in open fields, along interstate highways (sometimes disguised as trees), and even concealed in church steeples in small New England villages. Simultaneously, the growth in cell phone use by consumers has catapulted to a hundred and eighty million in the U.S. alone.

All of these wireless transmitters emit and receive radio frequency range signals that bombard and penetrate every living creature in their path, animal as well as human.

With the explosion in cell phone transmissions has come a rapid growth in other uses for RF range transmissions — digitized high speed internet access, digitized television broadcasts, email traffic and more. Often the cell transmitter

towers and installations are shared by other wireless companies, multiplying the volume and range of the RF signals radiating from each site.

All of this rapid technological change has been aided and encouraged by the Federal Communications Commission, whose declared mission under Congressional mandate is to "foster" rapid growth in telecommunications.

Currently, the FCC's strategic plan is to promote competition, innovation and investment in "broadband" services and facilities, described by the FCC as follows:

> Broadband technologies, which encompass all evolving high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services, are a fundamental component of the communications revolution.
>
> [www.fcc.gov/broadband]

The problem is that *no public agency really knows what the environmental impact* of this blanket of RF radiation is on the people and animals in its path, especially the most vulnerable members of society — the elderly, infirm, small children, the unborn. The reason no one knows is that the one agency that has been given total pre-emptive control over this issue by the U.S. Congress is the FCC, which refuses to try to find out, as the FCC final Order in this case shows.

This is an "innocent bystander" case. EMR Network represents the interests of members of the general public who, as innocent bystanders, are continuously bombarded by ever-increasing amounts and higher and higher frequencies of wireless transmissions in workplaces, homes and schools, generating growing layers of RF radiation with the potential of long-term adverse human health effects that may not be discovered and diagnosed until long after it is too late to do anything to prevent them.

Numerous scientific studies around the world have identified biologic effects resulting from exposure to high frequency wireless radiation, many of them potentially harmful to human health. The researchers have repeatedly called for more comprehensive and reliable research — which the FCC itself is best able to initiate, presumably in cooperation with the Environmental Protection Agency (EPA). Yet these studies are uniformly rejected by the Federal Communications Commission as "inconclusive" and the EPA's expertise has been sidelined.

Many scientific studies into biologic effects of low-power ultra-high frequency transmissions have been conducted by academic researchers hampered by limited resources. The growing chorus from these researchers calling for more thorough studies cannot responsibly be ignored by the one agency with Congressionally-mandated *sole responsibility* for setting wireless RF radiation safety standards and with the ability to request help from other agencies and to seek Congressional funding to conduct that research. (See 47 U.S.C. § 332(c)(7)(B)(iv).) That agency is the FCC. However, the FCG has repeatedly stonewalled these calls for research by responsible scientists not only in the U.S. but also in places like the U.K., Sweden, The Netherlands, Spain, Italy, Austria and other nations around the globe. It has done so in this very proceeding.

This Court can take judicial notice as legislative facts of the steady flow of relevant scientific studies that have been published even during the time this case has been pending. [A complete list of major RF radiation studies published since October 2003 will be found at: http://www.emrpolicy.org/science/research/docs/2003_2005_research.pdf]

Possibly the most dramatic of these published studies is a July 2004 report from Sweden, indicating that RF radiation produced by frequency-modulated FM radio transmissions

has increased the *incidence and mortality of skin cancers (i.e., melanomas)* in human populations in Sweden, France and Spain. The study concludes that these high frequency radio transmissions may neutralize protective cells in the skin that otherwise would combat and repair sun damage. [The full text of this study is available at: http://www.MedSciMonit.com/pub/vol_10/no_7/4321.pdf]

Other significant studies of the biologic effects of RF radiation that have been published while this case has been pending include a Korean report on leukemia, and a joint European study on DNA breaks. On January 11, 2005, the UK's National Radiological Protection Board headed by Sir William Stewart announced a comprehensive new report on mobile phones and base stations. (*See:* http://www.hpa.org.uk/radiation/publications/documents_of_nrpb/abstracts/absd15-5.htm). The Executive Summary of the report ends with a discussion of "Health-related research," and says:

> The Board particularly supports *the need for further research*, in the following areas:
>
> ***
>
> (c) effects of RF exposure on children,***
>
> (f) studies of RF effects on direct and established measures of human brain function and investigations of possible mechanisms involved, (1)
>
> (g) complementary dosimetry studies focused on ascertaining the exposure of people to RF fields.
>
> Executive Summary, par 89 (Emphasis added)

Members of the Federal Radiofrequency Interagency Work Group in the U.S., including representatives of EPA, FDA, NIOSH and OSHA, also have urged the FCC to review the human health impact of wireless RF radiation. (See letter

printed in the Joint Appendix in the Court of Appeals at A-22 – A-29). The Court of Appeals effectively dismissed this letter, saying it "didn't represent the official policy or position of member agencies."(A-16) The court's implication is that these career government employees were off on some frolic of their own. The official Charter under which they operate (adopted in July, 1995) takes a much different view of their role:

RF Inter-Agency Work Group
Charter

> The Radiofrequency (RF) Inter-Agency Work Group is established to provide a forum to address public health and regulatory issues pertaining to radiofrequency radiation, and provide a basis for coordination among member Agencies in their approach to RF issues. The Work Group will address the development of RF radiation exposure standards, guidance or guidelines for the general public, and specific devices. Both public health issues and interference issues are matters of concern. The Work Group will also provide a forum for discussion of specific RF radiation related activities and policies of the member Agencies which could affect other federal agencies represented in the Work Group. Recognizing the increasing use of RF technology, the Work Group will also provide a forum to discuss developing issues, and address the need for a more long range federal strategy. This will lead to a more coordinated federal approach to health issues associated with existing and proposed technology which use and produce exposure to RF radiation. Specific subcommittees will be established to carry out the work of the Inter-Agency Work Group.

> The RF Inter-Agency Work Group is composed of Federal agencies which have regulatory or public health responsibility to control the risk from the use and/or exposure to RF or have responsibility for regulation and management of the use of the RF radiation spectrum. This includes the Federal Communications Commission (FCC), National Telecommunications and Information Administration (NTIA), Food and Drug Administration (FDA), National Institute of Occupational Safety and Health (NIOSH), Occupational Safety and Health Administration (OSHA), and Environmental Protection Agency (EPA).

Rather than dismiss such sensible efforts at coordination and pooling of resources and experience between federal agencies, the courts should commend them and treat them with the same deference accorded to the individual agencies of which the members are composed.

The FCC has rejected all of these calls for further research into environmental health effects of RF radiation notwithstanding the overwhelming evidence from all over the world, as well as within this country, that such research is absolutely necessary to protect the public interest.

ARGUMENT

Reasons Relied on for Allowance of the Writ

1. THE DECISION OF THE COURT OF APPEALS BELOW DIRECTLY CONFLICTS WITH THE SECOND CIRCUIT'S LANDMARK DECISION IN SCENIC HUDSON ON THE AFFIRMATIVE DUTY OF A FEDERAL REGULATORY AGENCY TO INQUIRE INTO ALL RELEVANT FACTS, INCLUDING IMMEDIATE AND LONG-RANGE EFFECTS OF ITS ACTIONS, AND TO SUPPLEMENT THE RECORD WHERE NECESSARY

The District of Columbia Court of Appeals below rejected EMR's argument that a Federal agency charged with protecting the public interest has an affirmative duty to gather and consider all relevant facts. This principle of affirmative agency responsibility was decided in the landmark *Scenic Hudson* case in the Second Circuit in 1965, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 Fed.2d 608 (2nd Cir. 1965), *cert. denied* 384 U.S. 941 (1966). In that case, the Federal Power Commission limited itself in ruling on a controversial proposal to build a pumped storage plant inside Storm King Mountain in the Hudson Highlands by simply considering the technical feasibility and appropriateness of the project. On appeal the Circuit Court pointed out that Congress gave the FPC a broader responsibility.

> The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding. (*Id.* at p. 620)

And again,

> The Commission must see to it that the record is complete. The Commission has *an affirmative duty*

to inquire into and consider all relevant facts. (*Ibid.*) (Emphasis added)

The *Scenic Hudson* Court quoted an ICC Commissioner's description of how a federal agency should perform its responsibilities:

> 'The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in ***. The agency must always act upon the record made, and *if that is not sufficient, it should see the record is supplemented before it acts.* It must always preserve the elements of fair play, *but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible.****' (*Id.* at p. 621) (Emphasis added.)

The DC Court of Appeals in this case has obviously forgotten this primary duty of a federal agency charged with the public interest to inform itself and not to act ignorantly. This Court should remind the FCC Commissioners that their oaths of office require them to carry out the law and not sit back and pick and choose whether they feel "inclined" to do so or not. As the *Scenic Hudson* Court correctly observed:

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. *This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.* (Emphasis added.)

The FCC erred as a matter of law in asserting that it has no obligation to initiate the inquiry sought by the EMR petition. That result is compelled by the text of the 1996 Act and the absence of any statute assigning the duty of adopting emissions regulations to any other federal agency.

The Conflict Between the Circuits

The EMR petition to the FCC was a request that *the agency itself* conduct a factual inquiry into low-power non-thermal biologic effects of wireless RF transmissions. EMR did not ask the agency merely to evaluate existing studies, many of which were conducted by academics with limited resources in contrast to the resources available to the FCC and the other federal agencies on whom it can call for help. The studies submitted by EMR constituted the *prima facie* case for the FCC to initiate further studies into the biologic impact of its outdated regulations, not the final result of studies yet to be performed.

The FCC itself correctly understood the nature of EMR's petition from the outset:

> EMR had *requested that we initiate a proceeding to gather information and opinion about the need to revise our regulations* for radiofrequency ("RF") radiation and use the information so obtained to revisit our current guidelines for evaluating human exposure to RF emissions from transmitters under the jurisdiction of the Commission. (A-1) (Emphasis added)

The Court of Appeals, however, mistakenly treated the EMR request as one to make changes in the FCC's regulations based solely upon the research examples EMR supplied to the agency:

> Thus we review the Commission's rejection of EMR's petition as we would agency rejection of any petition to initiate a rulemaking. (A-19)

This is the wrong standard. As 47 CFR Sec. 1.430 makes absolutely clear, proceedings seeking a Notice of Inquiry "do not result in the adoption of rules, and Notices of Inquiry are not required to be published in the Federal Register." EMR's Petition for Inquiry was not a request for rulemaking, and should not have been treated as such.

The Court of Appeals exacerbated its legal error by basing its denial of the petition for review entirely on the concededly limited research gathered by the citizen's group, weighing and evaluating that research alone in deciding that an inquiry by the FCC was not necessary. The Court missed the whole point of the proceeding before the FCC. More significantly, it also repudiated the affirmative duty of a federal agency itself to gather all relevant facts, as decided by the Second Circuit in *Scenic Hudson.*

This is what the Court below said:

> EMR's submissions implicitly raise one of the strongest potential bases for overturning an agency's refusal to initiate a rulemaking — that "a significant factual predicate of a prior decision on the subject has been removed." *WWHT*, 656 F.2d at 819; see also *American Horse*, 812 F.2d at 5; *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). EMR suggests that the studies it submitted (after the decision of the Office of Engineering & Technology) show that exposure to RF radiation is unsafe at levels too low to cause thermal effects. But the articles submitted are nothing if not tentative. One, for example, hypothesizes a mechanism by which cell phone radiation might promote cancer, but also notes that "[t]o date, there is limited scientific evidence of health issues, and no mechanism by which mobile phone radiation could influence cancer development." Peter W. French et al., *Mobile Phones, Heat Shock Proteins and Cancer*, 67 Differentiation 93, 93 (2000). We find

> nothing in those studies so strongly evidencing risk as to call into question the Commission's decision to maintain a stance of what appears to be watchful waiting. (A-21)

The burden is not on the citizen's group *to provide the complete evidentiary record* for the FCC to decide whether to revise the FCC's outdated guidelines. That burden rests squarely on the FCC itself. The only burden the EMR voluntarily assumed was to show the FCC that there was a reasonable basis for the agency to initiate more comprehensive research on its own and, if necessary, to request the assistance of other qualified federal agencies to help conduct authoritative and reliable research.

The Public Interest Mandate

Congress explicitly has directed the Federal Communications Commission to encourage deployment of advanced telecommunications technology "in a manner consistent with the public interest."

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, *in a manner consistent with the public interest*, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
>
> (47 U.S.C. § 157 (a)) (Emphasis added.)

The obligation of the FCC to regulate *in the public interest* is especially relevant to its current headlong rush to authorize digital, high speed, broadband wireless transmissions,

particularly in regard to the potential health impact of such expanded wireless services on schoolchildren.

Impact on Schoolchildren

Congress directed the FCC to focus "in particular" on the wireless transmission of advanced telecommunications to "elementary and secondary schools and classrooms." The "public interest" of students, parents and teachers plainly is not limited to technological advancement.

In EMR's Reply Brief below we called the Court of Appeals' attention to the FCC's currently pending plans to expand wireless transmissions to "broadband services" and the agency's emphasis on transmitting these higher frequency radio signals *into schools* (See FCC 99-5). EMR pointed out that:

> *The FCC has never reviewed, questioned or altered its obsolete 1985 Radiofrequency Radiation Guidelines based on the potential environmental impact of the new advanced broadband communications services on students at elementary and secondary schools.* The FCC's order of August 14, 2003, which is the subject of this appeal, has now closed the door to any FCC-initiated research to determine whether guideline changes are required *to protect schoolchildren from harm caused by broadband RF radiation.*
>
> (EMR Reply Brief pp. 4-5) (Emphasis added.)

The FCC's ongoing expansion of high frequency broadband wireless services even while the appeal in this case was pending before the Court of Appeals plainly should not have been allowed to proceed until the agency initiated an adequate fact-finding study of the potential public health effects on innocent bystanders — especially school children, the primary target of the FCC's broadband initiative. Children, as the British NRPB has recognized (*supra*), are biologically

different from adults and the same exposure standards for adults do not apply to them. Children's skulls, for instance, are thinner and absorb radiation more efficiently with deeper RF penetration. They will also be around longer than adults to accumulate long-term effects from years of additional exposure.

The concerns of parents of elementary school children over potential long-term harm to their children from wireless RF radiation is dramatically articulated by a recent statement by the spokesperson for parents at PS 122 in New York City [available at http://www.emrpolicy.org/public_policy/schools/gonzalez_11jan05.pdf].

Such parental concerns are not limited to the United States. In Greece recently, some 500 schoolchildren on the island of Lesvos refused to attend classes because of the presence of a camouflaged mobile telephone mast. Local authorities revoked the telephone operating license in March. (Reported in *Kathimerini* newspaper (English Edition) Friday, March 18, 2005 (Athens)) This remedy is not available to school students or their parents in this country because the FCC has absolute and total control over the licensing of cell towers that meet its 1985 guidelines.

UK's "Precautionary Approach"

The NRPB (Stewart) reports issued in 2000 and 2004 (see: http://www.hpa.org.uk/radiation/publications/documents_of_nrpb/abstracts/absd15-5.htm) both urged a "precautionary approach" in avoiding the exposure of small children to RF radiation — a "public interest" concern the FCC has totally failed to address or consider while it has been tossing all such caution to the winds.

2. THE PRE-EMPTIVE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION OVER STATE AND LOCAL GOVERNMENTS TO SET HUMAN EXPOSURE GUIDELINES OBLIGATES THE FCC TO REVIEW AND UPDATE THOSE GUIDELINES REGULARLY

The heart of the FCC Order below is the following statement in the opening paragraph on page 1 of the Order:

> EMR had requested that we initiate a proceeding to gather information and opinion about the need to revise our regulation for radiofrequency ("RF") radiation and use the information so obtained to revise our current guidelines for evaluating human exposure to RF emissions from transmitters under the jurisdiction of the Commission. We find that OET was correct in dismissing the petition, having determined that *this Commission is not the most appropriate forum* to initiate such an inquiry or proceeding concerning the environmental effects of RF radiation at this time. (Emphasis added.)(A-1 – A-2)

The Commissioners may not wish to be the "most appropriate" forum to initiate an inquiry, but they do not have a choice in the matter. Congress did not give them the luxury to pick and choose what they want to do. They are public officials with a clear public responsibility. Their refusal to act was a plain dereliction of duty.

The Telecommunications Act of 1996 — passed following intensive lobbying and lavish campaign contributions to Members of Congress of both parties — blocked all local environmental opposition to the siting of cell transmitters in communities across the United States by giving the FCC *total and absolute preemptive control over the question of environmental harm*. The impact of that legislation, and the

FCC's response, was summarized succinctly by the Second Circuit in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, at 88 (2nd Cir. 2000):

> While the FCC was considering the proposed guidelines, Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Act"), several provisions of which affected the FCC's ongoing proceedings. In particular, *the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation* where the facilities would operate within levels determined by the FCC to be safe. *See* 47 U.S.C. § 332(c)(7)((B)(iv). In the Second Order that is at issue in this case, the FCC announced, *inter alia*, a rule that prohibited state and local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions. (Emphasis added)

The Second Circuit emphasized the significance of the Telecommunications Act of 1996 at page 95-96:

> IV. The FCC's Preemption of Certain State Regulation
>
> As noted earlier, while the rule-making process was underway, Congress passed the Telecommunications Act of 1996, providing, *inter alia*, that
>
> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. § 332(c)(7)(B)(iv).

> *The FCC, as part of its rulemaking, issued a comparable interpretive ruling preempting state and local governments* from regulating, based on RF emissions, the operation of personal wireless service facilities that are in compliance with the FCC regulations concerning such emissions. (Emphasis added)

The Second Circuit rejected the petitioners' argument there that under the Telecommunications Act of 1996 state and local governments could still regulate the "operation" of cell transmission towers (at p. 96):

> Section 332(c)(7)(B)(iv) does not amount to clear congressional intent to permit state and local governments to regulate the operation of such facilities. The FCC's interpretation is therefore entitled to deference and, because the FCC's interpretation is reasonable, we are bound to accept it.

The Commission's regulations governing radio frequency emissions therefore *totally block* any and all citizen and governmental challenges to the installation of transmission facilities based on environmental harm. The hands of town, city and state officials are completely tied on the question of potential harmful environmental effects because of this absolute vesting of power and authority in the FCC.

Although the Commissioners and FCC staff may feel inadequate to perform this responsibility, they have no choice in the matter. It is their duty to inform themselves. The law of the land requires that they issue and maintain regulations governing radiofrequency emissions to guard the human health of every citizen in the nation. It is a duty that cannot be blithely brushed aside. The FCC is charged by law with protecting the public from environmental harm caused by RF emissions.

The Commission has totally abandoned that responsibility in this proceeding. Its members must therefore be directed by the reviewing Court to initiate an inquiry into the environmental effects of its existing and proposed regulations without further delay.

3. THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) IMPOSES A "CONTINUING RESPONSIBILITY" ON THE FCC TO USE ALL PRACTICABLE MEANS TO ASSURE SAFE AND HEALTHFUL SURROUNDINGS FOR ALL AMERICANS

The National Environmental Policy Act (NEPA) is the basic national charter for protection of the environment. The Act declares it a national policy to "encourage productive and enjoyable harmony between man and the environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and to enrich the understanding of the ecological systems and natural resources important to the Nation" (42 U.S.C. § 4321). The Act specifically declares a "*continuing policy of the Federal Government*, in cooperation with State and local governments, and other public and private organizations *to use all practicable means and measures* . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans" (42 U.S.C. § 4331).

NEPA also states that it is *the continuing responsibility of the Federal Government to use all practicable means,* consistent with other essential considerations of National policy, to improve and coordinate Federal plans, functions, programs, and resources to, among other things: *assure safe, healthful*, productive and esthetically and culturally pleasing *surroundings for all Americans*; attain the widest beneficial

use of the environment without degradation, or risk to health or safety; preserve important historic, cultural and natural aspects of our national heritage; achieve balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and, enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources (42 U.S.C. § 4331).

The Act directs "that, to *the fullest extent possible*, the policies, *regulations and public laws* of the United States *shall be interpreted and administered in accordance with the policies of the Act*", and imposes general and specific requirements on all Federal agencies (42 U.S.C. § 4332).

Agencies are required to "utilize a systematic, *interdisciplinary approach* which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making. . .". They are also to insure that "*unquantified environmental* amenities and *values may be given appropriate consideration in decision making along with economic and technical considerations*"(42 U.S.C. § 4332 (2)(A)) (Emphasis added in all cases.)

The FCC concedes that it is not exempt from NEPA. It has the same "continuing responsibility" as other agencies to review and upgrade policies — in this case its RF Radiation Guidelines — to meet current conditions. This is an affirmative ongoing responsibility. The FCC may not stick its head in the sand and pretend that nothing is happening that brings its Guidelines into question.

The Second Circuit in its recent decision rejecting a direct substantive challenge to the FCC's Guidelines squarely addressed the applicability of NEPA to the FCC. It concluded that the FCC properly considered the environmental impact

of its rulemaking *at the time the Guidelines were originally adopted. Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 95 (2nd Cir. 2000).

However, the issue presented here is a different one. The FCC's basic guidelines were adopted in 1985, with certain limited revisions in 1996-7. The scientific data on which the Guidelines were based, and on which the FCC made its original determination of environmental impact, pre-dated 1982 when the proposed Guidelines were first published. The research related solely to the *thermal* effects of acute exposure to various RF power levels — the functional equivalent of microwave ovens — *and never addressed the question of extended exposure to low-power RF emissions.*

The question in this proceeding is whether the "continuing responsibility" imposed by NEPA requires the FCC to initiate a new environmental inquiry based on recent and ongoing scientific studies — and initiate new studies — in light of all that has happened since 1982.

The Court of Appeals cited the Supreme Court's 2004 decision in *Norton* as the basis for rejecting any continuing FCC obligation under NEPA:

> EMR accordingly focuses on agencies' NEPA duties when new evidence turns up after completion of an EIS (or equivalent), citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). *Marsh* considered a claim that the Corps of Engineers had neglected its NEPA duties when, one third of the way through construction of a dam, it received information arguably suggesting that the dam would cause more severe environmental harm than had been supposed at the time the EIS had been completed and construction approved. Regulations require an agency to prepare a Supplemental Environmental Impact Statement when "[t]here are significant new circumstances or information

relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1)(ii), and the parties agreed that agencies were required to take a "hard look" at evidence suggesting that this standard had been met. *Marsh*, 490 U.S. at 370-74. The Court rejected plaintiffs' view that a reviewing court should examine the evidence afresh, ruling instead that the usual "arbitrary and capricious" standard should apply. *Id.* at 375-78. EMR suggests that the current circumstances are a "fair parallel" to those in *Marsh*. Petitioner's Br. at 36.

The FCC argues strenuously that it satisfied the "hard look" requirement, but we need not resolve that issue. In *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004), the Court declined to apply *Marsh* were the federal action in question was approval of a land use plan. Unlike the dam in *Marsh*, that "action" was complete when the new information was received. *Id.*, at 2384-85. Presumably later actions pursuant to the plan might be significant enough to require NEPA filings, just as some FCC actions relating to RF radiation will need new environmental studies — including, for example, the circumstances where the current regulations call for such studies. *But the regulations having been adopted, there is at the moment no "ongoing" federal action, id.* at 2385, *and no duty to supplement the agency's prior environmental inquiries.*

(A-18 – A-19.) (Emphasis added.)

The Court of Appeals was gravely mistaken.

The "Ongoing" Federal Action

The Court of Appeals' major factual error was its statement that "there is at the moment no 'ongoing' federal action." (A-19) The Court plainly overlooked the facts publicly available from the FCC and expressly provided in EMR's Main Brief on *the FCC's continuing strategic goal and plans* to expand radio frequencies for wireless Broadband services:

> The FCC's strategic goal for Broadband is *to establish regulatory policies that promote competition, innovation, and investment in Broadband services and facilities* while monitoring progress toward the deployment of broadband services in the United States and abroad.
>
> (Quoted at Brief page 46) (Emphasis added.)

Most significantly, the Court of Appeals overlooked the *proposed new regulations* publicly announced by the FCC just before oral argument (explicitly called to the Court's attention in the "Recent Developments" document dated September 27, 2004 handed up to the Court during the oral argument itself). That official press release clearly described the FCC's *ongoing federal action*:

> September 9, 2004:
>
> Washington, DC — *The Federal Communications Commission today provided an additional twenty megahertz of spectrum that can be used to offer a variety of broadband and advanced wireless services (AWS),* potentially including "third generation" (3G) wireless services. The Commission allocated and paired five-megahertz blocks of spectrum at 1915-1920 MHz with 1995-2000 MHz, and 2020-2025 MHz with 2175-2180 MHz for AWS use. *This will benefit the public by fostering the development of new wireless services* that

> will provide American consumers with additional communications options and capabilities. (Emphasis added.)

A copy of the FCC Press Release of September 9, 2004 was attached to petitioner's Reply Brief in the Court of Appeals and was headed:

FCC DESIGNATES SPECTRUM FOR ADVANCED WIRELESS SERVICES AND PROPOSES LICENSING AND SERVICE RULES

This *ongoing federal action* plainly required the FCC to examine the environmental impact of the "new wireless services."

CONCLUSION

The Court should grant certiorari to review the arbitrary and capricious action of the Federal Communications Commission in refusing to initiate up-to-date accurate scientific research into the biologic health effects on innocent bystanders, particularly schoolchildren, from continuous low-power RF radiation produced by the rapidly expanding ultra-high frequency wireless services the agency is actively authorizing and encouraging.

Respectfully submitted,

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May 10, 2005

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)
EMR Network Petition for Inquiry To Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation	)

ORDER

Adopted: July 28, 2003 **Released: August 14, 2003**

By the Commission: Commissioner Copps issuing a statement.

INTRODUCTION

1. By this action, we deny the Application for Review[1] filed by the EMR Network ("EMR"), contesting the decision of the Chief, Office of Engineering and Technology ("OET") to dismiss EMR's Petition for Inquiry.[2] EMR had requested that we initiate a proceeding to gather information and opinion about the need to revise our regulations for radiofrequency ("RF") radiation and use the information so obtained to revisit our current guidelines for evaluating human exposure to RF emissions from transmitters under the jurisdiction of the Commission. We find that OET was correct in dismissing the petition, having determined that this

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[1] We consider herein both the Application for Review filed by EMR Network and its Supplement to that application.

[2] Letter from Bruce A. Franca to James R. Hobson, December 11, 2001 ("Dismissal letter").

Commission is not the most appropriate forum to initiate such an inquiry or proceeding concerning the environmental effects of RF radiation at this time.

BACKGROUND

2. Pursuant to the National Environmental Policy Act of 1969 (NEPA)[3], the Commission has established guidelines for human exposure to radiofrequency ("RF") radiation.[4] These guidelines, first established in 1985[5], regulate the amount of RF radiation to which humans may be exposed by various transmitters regulated by the FCC. The guidelines and methods for evaluating the environmental effects of RF have been revised as scientific knowledge in the area has advanced and standards-setting bodies upon which the Commission relies in setting its exposure guidelines have revised their maximum acceptable exposure criteria. The current guidelines were finalized in 1997, based on the recommendations and advice of federal agencies and groups with expertise in health-related areas and in standards setting.[6] More recently, the Commission updated its procedures for measuring RF exposure from mobile and portable devices.[7]

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[3] 42 U.S.C. §§ 4321 *et seq.* (1976).

[4] 47 C.F.R. §§ 1.1307(b), 1.1310, 2.1091, and 2.1093.

[5] *Report and Order* in GEN Docket 79-144 (*RF Report and Order I*), 100 F.C.C. 2d 543 (1985); *Memorandum Opinion and Order* in GEN Docket 79-144, FCC 85-467, released August 22, 1985, 58 RR 2d 1128 (1985).

[6] *Report and Order* in ET Docket No. 93-62 (*RF Report and Order II*), 11 FCC Rcd 15123 (1996); *Second Memorandum Opinion and Order and Notice of Proposed Rule Making* in WT Docket No. 97-192 and ET Docket No. 93-62, 12 FCC Rcd 13494 (1997).

[7] Public Notice, *Office of Engineering and Technology Announces Release of Revised Supplement C to OET Bulletin 65*, DA 01-1557, June 29, 2001; Public Notice, *Office of Engineering and Technology Announces a Transition Period for the Phantom Requirements of Supplement C to OET Bulletin 65,* DA 02-1438, June 19, 2002.

These procedures are based on the work and recommendations of an expert group of the Institute of Electrical and Electronics Engineers (IEEE).[8]

3. In its petition for inquiry, EMR requested that the Commission initiate a proceeding to gather information and opinion about the need to revise our regulations regarding human exposure to RF radiation. It further requested that the Commission use the information obtained in such an inquiry to revisit the guidelines currently established for evaluating human exposure to RF emissions from FCC-regulated transmitters. EMR observed that the Commission's current RF limits are several years old, and asserted that there are a number of studies which purport to demonstrate a health hazard from RF radiation that is not contemplated in our rules. In particular, EMR argued that non-thermal effects and the effects of long-term low-level exposure were not taken into consideration in setting the Commission's RF exposure guidelines. EMR supported its request by reference to a letter written by members of the Radiofrequency Interagency Working Group (IWG), an *ad hoc* group of scientific professionals from various federal agencies that have jurisdiction over or interest in various radiofrequency issues, to the Risk Assessment Working Group of the IEEE.[9] In that letter, at the request of the IEEE, the members of the IWG identified issues which they suggested should be addressed in considering revisions to IEEE's RF exposure guidelines.

4. OET dismissed EMR's petition, noting that in developing rules to implement health and safety related concerns, this Commission has historically relied on agencies with

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[8] The IEEE Standards Coordinating Committee 34, Subcommittee 2 is convened specifically to develop procedures for evaluating the Specific Absorption Rate ("SAR") of RF emissions from wireless handsets.

[9] Letter from W. Gregory Lotz, Ph.D. to Mr. Richard Tell, June 17, 1999 (Lotz letter).

primary expertise and responsibility for ensuring health and safety, such as the Environmental Protection Agency ("EPA") and the Food and Drug Administration (FDA). It observed that the current exposure guidelines are derived from criteria established by the National Council on Radiation Protection and Measurements (NCRP) and the IEEE, as further informed by the advice of the EPA, FDA, and other health and safety agencies. It noted that the adequacy of the Commission's RF exposure guidelines had been recently upheld, in the face of arguments similar to those advanced here by EMR, by the Second Circuit Court of Appeals.[10] OET concluded that a determination of whether the RF safety limits should be revised is, at least initially, more properly the jurisdiction of such agencies, and accordingly dismissed the petition.

DISCUSSION

5. EMR argues that OET failed to state the grounds for its action or to explain the conflicts of that action with law, precedent, and policy. EMR principally argues that the Commission cannot defer the responsibility for its rules to others and that the Commission has initiated action with regard to establishing its RF exposure guidelines in the past, contrary to OET's assertion in its dismissal letter that the Commission relies on other agencies and should not now take the initiative in this area. EMR contends that while the Commission states its reliance on other expert agencies in determining appropriate RF exposure guidelines, OET ignored a letter from the staffs of those agencies in rendering its decision.[11] It questions whether the Commission should rely on the IEEE, which it refers to as a private, commercial body dominated by private commercial interests, for developing RF exposure standards, contending that the other agencies upon which the

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[10] *See Cellular Phone Task Force v. FCC*, 205 F.3d 82 (2d Cir., 2000).

[11] EMR refers to the Lotz letter, *supra*.

Commission would rely for guidance in this area variously lack the resources or the interest to participate or to "push back" on the work or recommendations of the IEEE. In a Supplement to its Application for Review, EMR cites the lack of response from other health and safety agencies to which it sent inquiries regarding this matter.[12] EMR distills its argument into a claim that current RF bioeffects research is privately orchestrated, and thus not credible. It concludes by citing the "Recommendations for Executive Action" of a May 2001 Report by the Government Accounting Office[13], in which GAO recommends that the FCC Chairman direct OET to issue revised guidance on SAR testing procedures, and to consult with FDA on the method of incorporating measurement uncertainty in determining compliance with RF safety limits, as further evidence of a need to conduct such an inquiry.

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[12] With its Supplement, EMR submits letters from a staff member of the Environmental Protection Agency (Letter from Norbert Hankin to Ms. Janet Newton, July 16, 2002, "EPA letter"), the Director of the National Institute of Environmental Health Sciences at the National Institute of Health (Letter from Kenneth Olden, Ph.D to Ms. Janet Newton, February 21, 2002, "NIH letter"), the Acting Director of the Centers for Disease Control and Prevention at the National Institute for Occupational Safety and Health (Letter from Kathleen M. Rest, Ph.D, M.P.A. to Ms. Janet Newton, April 2, 2002, "NIOSH letter"), and the Assistant Secretary for Occupational Safety and Health at the U.S. Department of Labor (Letter from John L. Henshaw to Ms. Janet Newton, May 10, 2002, "OSHA Letter"). These letters were sent to EMR in response to its solicitation from these agencies of support for an inquiry into current RF health-related research and the adequacy of the FCC's current RF exposure guidelines. EMR apparently did not receive responses to similar letters from the Food and Drug Administration or the National Telecommunications Information Agency.

[13] GAO Report to Congressional Requesters, *Research and Regulatory Efforts on Mobile Phone Health Issues*, GAO-01-545, May, 2001, at 31-32.

6. We find that, contrary to EMR's assertions, the OET action does not conflict with pertinent law or regulation, and we hereby affirm its decision to dismiss EMR's Petition for Inquiry. OET's fundamental premise — our reliance on the expertise of health and safety agencies in this area — is our sound guiding principle, and EMR has failed to advance any argument that persuades us otherwise.[14]

7. EMR relies primarily on the Lotz letter to support its contention that there are areas of insufficiently explored concern regarding the health effects of human exposure to RF radiation. We agree that in this letter, knowledgeable individuals appropriately identified issues of potential interest in setting RF exposure guidelines. These ideas had been solicited by another working group of experts convened to consider just such matters, the IEEE Risk Assessment Working Group. It is telling, however, that the letter specifically noted that it did not reflect the views of the respective agencies by which the individual IWG members are employed.[15] The IEEE Risk Assessment Working Group has taken these concerns under advisement, but has yet to determine what, if any, responsive action is appropriate. Moreover, not one of the agencies represented by the members of the IWG, whose views and formal actions are informed in part by these individuals and also by other individuals and sources, has elected to initiate any action which EMR can

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[14] This is not to say that this Commission could not or would not initiate action in the face of compelling evidence of a need for such action. But, where, as here, other more expert agencies have the same information as we have and do not see reason for action, as we further discuss below, it would be difficult for us to ignore the tacit conclusions of those agencies, absent a compelling case to do so.

[15] "The views expressed in this correspondence are those of the members of the Radiofrequency Interagency Work Group and do not represent the official policy of position of the respective agencies." Lotz letter, *supra*, at para. 2.

point to or of which we are otherwise aware in response to these issues.

8. EMR argues that by directing EMR's efforts to other agencies, the Commission seeks to be relieved of a responsibility that it cannot legally avoid. In making this argument, EMR suffers a critical misapprehension. As outlined above, this Commission has carefully and assiduously developed RF guidelines to protect the public according to the best science available, as interpreted by the agencies most expert in the pertinent fields. As aptly recognized by OET in reaching its determination to dismiss EMR's petition, we will continue to rely on just such expertise in evaluating the continued propriety of our RF guidelines. When there is an appropriate indication by such agencies, or other expert sources, whether self-initiated or in response to outside petition or activities, we could consider the need for an investigative effort in support of possible exposure rules revisions. We reiterate here OET's recognition that our RF exposure guidelines were recently upheld by the Court of Appeals.[16] In that decision, the Court specifically recognized that the "the FCC satisfied itself that there was a mechanism in place for accommodating changes in scientific knowledge.... [including scientific committees and ongoing research] ... 'and that it would 'consider amending [its] rules at any appropriate time if these groups conclude that such action is desirable.'" [17] This is precisely the posture that we continue to maintain, as illustrated by OET's decision.[18]

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[16] *Cellular Phone Task Force v. F.C.C.*, 205 F.3d 82 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

[17] *Id.*, at 90, 91.

[18] We note here that FCC staff continues to participate in the Federal Radiofrequency Interagency Working Group, which monitors developments related to RF biological effects, and in various IEEE committees and subgroups related to RF research, oversight, and standards setting. With this participation, among other means, the Commission stays

9. EMR attempts to undercut our reliance on this position by relating previous instances in which, it contends, the Commission acted on its RF exposure guidelines on its own initiative. Each of those instances, however, is inapposite to the present circumstances. EMR points out that the Commission's initial proceeding to establish RF exposure limits was commenced without input or specific encouragement from other agencies. At that time, however, the Commission, with no rules regulating human RF exposure, was compelled to undertake a rulemaking proceeding in order to comply with the provisions of the NEPA. When the American National Standards Institute (ANSI) and IEEE established guidelines in this area during the course of that proceeding, the Commission incorporated them into its proceeding, and they formed the basis for the rules eventually adopted.[19] In its more recent revision of RF exposure guidelines, also cited by EMR, the Commission significantly and explicitly relied on expert advice in forming the basis for its initiation of that action[20] and in reaching its conclusions regarding appropriate exposure levels.[21] EMR asserts that, in its reconsideration decision, the Commission in fact "dared to choose between two sets of recommended standards and between and among the conflicting view of other federal agencies themselves."[22] The point of this assertion seems to imply that we cannot now disclaim the ability or responsibility to make such decisions. Neither OET's decision nor our affirmation of that decision, however, would or should do so. OET's conclusion not to proceed with an inquiry on the basis of EMR's Petition,

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informed of studies and other information available, as well as the activities and opinions of other agencies pertinent to this area.

[19] *RF Report and Order I, supra* at 543.

[20] *RF Report and Order II, supra* at 15184.

[21] *Id.*

[22] EMR Application for Review at 8.

affirmed here, is not based on an unwillingness to choose among conflicting expert information and recommendation, but rather is based on the dearth of such information or recommendations. It is also illustrative of the propriety and effectiveness of our reliance on other experts to recognize that the most recent proceeding to revise our exposure rules was initiated in response to revisions in the ANSI/IEEE standards. We acted in response to the ANSI/IEEE revision explicitly to "reflect recent scientific studies of the biological effect of RF radiation" in order to "ensure that FCC-regulated facilities [would] comply with the latest safety guidelines for RF exposure."[23]

10. While EMR would question the impartiality of the IEEE itself and of the federal agencies and their personnel that participate in its committees and subgroups, the fact remains that IEEE, a nonprofit entity with members representing a variety of interests, including government, industry, and academia, is composed of leading experts in this area. There is no other comparable group of experts with which to consult or upon which to rely. Without the knowledge and views of such experts, credible guidelines and policy in this area cannot be formed. Despite EMR's implication that the IEEE is captive of the industry, it is important to note that membership in the subject committees and subgroups is open, permitting the government and academia to participate to the full extent they desire. Neither the FCC participants nor other government participants have determined that a bias controls or adversely affects the work or deliberations of the IEEE. We note that EMR's criticism of the IEEE is based on a journal article and emphasizes "early draft" proposals rather than final actions.[24] It is final actions, not early drafts, that are significant, and as a participant in the IEEE, we do

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[23] *RF Report and Order II, supra* at 15128.

[24] EMR Application for Review at n. 23.

not find this reference compelling. Moreover, IEEE is not the only source of expertise upon which this agency relies.[25] Also, while EMR decries the private funding for research in this field, research results are critically considered before they would form a basis for action. Moreover, one federal agency, the FDA, currently responsible for overseeing certain research funded by industry is apparently satisfied with that research's objectivity, and it is not our place to second-guess their position in this regard. Additionally, the federal government, through the National Toxicology Program of the National Institute of Environmental Health Sciences, is in the early stages of a long-term study of potential health effects from mobile phones that may provide a basis for future consideration of RF exposure limits. We note that this effort has been undertaken pursuant to a recommendation of the FDA. In sum, EMR's protestations regarding the adequacy of the IEEE or of current research to inform the fundamental decision as to whether and when to initiate a revision of the RF emission guidelines, are not sufficient to warrant an inquiry by this agency at this time.

11. While EMR correctly notes, in a related argument, that it must petition the Commission for changes in Commission's rules, it fails to discriminate what constitutes an adequate basis for pressing such a case. Were EMR to demonstrate reliable pertinent information developed by an appropriate agency or other expert source, we would have a basis for opening a rulemaking or fact-finding proceeding. In the absence of a demonstrable show of concern, or even

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[25] In establishing our most recent guidelines, we relied primarily on the recommendations of the NCRP and federal health and safety agencies. See, *RF Report and Order II*, *supra*. While EMR decries the withdrawal of the NCRP from this field, we note that the NCRP has recently decided to reconstitute its subcommittee that deals with RF exposure issues. The FCC is a collaborating organization of the NCRP. FCC staff also participates in international activities related to RF exposure, including those sponsored by the World Health Organization.

interest, by other expert agencies with the same (or greater) knowledge of research in this field — and its implications — as we possess, we are not inclined to generate such an inquiry on our own. Additionally, we do not have the prerogative to order other agencies to do so or to participate in an inquiry that this agency might initiate in spite of their better-informed inaction.

12. Finally, EMR, in its Supplement, points to letters it received in response to its own assertion of the inadequacy of our current rules and its solicitation of support for a Commission rule making, directed to six agencies and institutions.[26] As EMR recognizes in its Supplement, the agencies' responses clearly demonstrate the lack of interest on their part to initiate a proceeding or inquiry at this time.[27] EMR concludes from these responses that this Commission is compelled to action. We believe, however, that these responses affirm OET's determination that other more expert agencies, which are at least as well informed at the FCC, are not inclined to action at this time, and that there is no glaring flaw in their decision making and no compelling evidence of which we are uniquely aware that suggests to us that a rule making or inquiry is warranted at this time. We note, significantly, that these letters do demonstrate that some of

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[26] *See* n. 12, *supra*. According to its Supplement, only four of six agencies responded to EMR's solicitation.

[27] The EPA letter, *supra*, is an informal response by an individual without authority to speak for the agency, and merely reiterates information already in the record. The NIH letter, *supra*, indicates its intention to conduct laboratory research of the nature sought by EMR (which, we note, could form the basis for a recommendation for further inquiry or action). The NIOSH letter, *supra*, asserts that agency's past and continuing review of RF radiation bioeffects literature worldwide. The OSHA letter, *supra*, remarks that its interest is limited to the workplace (which is included in our RF exposure guidelines), and that it has and will continue to work with other agencies and professional organizations to monitor the possible health effects from RF exposure.

these agencies are continuing to monitor literature and conduct research in the area, which supports the premise upon which our own determination is based.

13. As an incidental matter, in response to EMR's assertions regarding the recommendations for Commission action in the 2001 GAO Report, we note that the Commission has, in fact, revised testing procedures for mobile and portable devices, as indicated in paragraph 2, above, and that OET staff and FDA staff have worked together on the matter of accounting for measurement uncertainty in testing for RF exposure, as reflected in the recent revisions to the on the joint FDA/FCC website on RF Safety (<www.fcc.gov/oet/rfsafety>). Each of these actions reflects the Commission's continuing involvement with other agencies in areas related to the regulation of RF exposure.

ORDERING CLAUSES

14. Accordingly, IT IS ORDERED That pursuant to Section 4(i) and 4(j) of the Communications Act of 1934, as amended (47 U.S.C. §§ 154(i), 154(j)), the Application for Review filed by EMR Network IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

RE: EMR Network Petition for Inquiry To Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation (Report and Order).

I write separately to stress that in this Order the Commission reaffirms its commitment to monitor developments related to the biological effects of RF energy. Should additional scientific evidence emerge, concerned parties should bring such evidence to our attention. Evidence of this type could mean that the Commission would have a "basis for opening a rulemaking or fact-finding proceeding."[1]

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[1] *Order* at ¶ 11.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 27, 2004 Decided December 7, 2004

No. 03-1336

EMR NETWORK,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Review of an Order of the
Federal Communications Commission

Whitney North Seymour, Jr. argued the cause for petitioner. With him on the brief was *James R. Hobson*.

Nandan M. Joshi, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *R. Hewitt Pate*, Assistant Attorney General, U.S. Department of Justice, *Catherine G. O'Sullivan* and *Andrea Limmer*, Attorneys, *John A. Rogovin*, General Counsel, Federal Communications Commission, *Daniel M. Armstrong*, Associate General Counsel, and *Joel Marcus*, Counsel.

Before: EDWARDS and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: A variety of facilities and products subject to Federal Communications Commission regulation, including towers and other facilities for radio, TV, and cell phone communications, and cell phones themselves, transmit radio signals — and with them radiofrequency ("RF") radiation. At certain levels RF radiation may have adverse "thermal" health effects, caused by heating human tissue. The Commission has issued regulatory guidelines based on its assessment of those effects.

Non-thermal effects are also of potential concern, but in its last review of its RF radiation guidelines the Commission declined to tighten its restrictions on that account. See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 12 FCC Rcd 13494, 13505, ¶ 31 (1997). Its decision, resting on the scientific uncertainty about such effects and the costs of imposing restrictions without a clearer showing of effects, was upheld by the Second Circuit as within the Commission's discretion. See *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90-92 (2d Cir. 2000).

The year after the Second Circuit decision, EMR Network filed a petition asking the Commission to initiate an inquiry on the need to revise the regulations to address non-thermal effects. It relied principally on a letter from members of the Radiofrequency Interagency Work Group, which is made up of staff members from various federal agencies, including the FCC, and which studies the effects of RF radiation. Joint Appendix ("J.A.") 23. The letter, which didn't represent the official policy or position of member agencies, laid out a number of issues that the staff members believed "need to be addressed to provide a strong and credible rationale to support RF exposure guidelines." J.A. 22. The

letter expressly declined to assign priorities to the issues; and in no way did it sound the tocsin for new regulations. After the Office of Engineering & Technology rejected EMR's initial petition, but before the Commission ruled on the issue, EMR submitted several academic studies discussing potential health effects from exposure to RF radiation at levels lower than are currently permissible without additional environmental analysis. See 47 C.F.R. §§ 1.1306, 1.1307. The Commission affirmed the dismissal of EMR's petition, concluding that there was "no compelling evidence" that a rulemaking was warranted. *EMR Network Petition for Inquiry To Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation*, 18 FCC Rcd 16822, 16827, ¶ 12 (2003).

EMR now petitions for review of the Commission's order, arguing principally that the Commission has violated its duty under § 102 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, to ensure that agencies consider the environmental effects of their decisions. We affirm the Commission's order.

* * *

Section 102(2)(C) of NEPA requires a federal agency to prepare an Environmental Impact Statement ("EIS") as part of any "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In appropriate cases an agency can instead prepare an Environmental Assessment, followed by a Finding of No Significant Impact. See 40 C.F.R. §§ 1501.4(a)-(e); see also *Dep't of Transportation v. Public Citizen*, 124 S. Ct. 2204, 2209-10 (2004); *Sierra Club v. U.S. Dep't of Transportation*, 753 F.2d 120, 126 (D.C. Cir. 1985). Although the FCC had not prepared a formal EIS in making its latest revisions to its RF radiation rules, *Cellular*

Phone Taskforce held that it had "functionally" satisfied NEPA's requirements "in form and substance." 205 F.3d at 94-95.

EMR accordingly focuses on agencies' NEPA duties when new evidence turns up after completion of an EIS (or equivalent), citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). *Marsh* considered a claim that the Corps of Engineers had neglected its NEPA duties when, one third of the way through construction of a dam, it received information arguably suggesting that the dam would cause more severe environmental harm than had been supposed at the time the EIS had been completed and construction approved. Regulations require an agency to prepare a Supplemental Environmental Impact Statement when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1)(ii), and the parties agreed that agencies were required to take a "hard look" at evidence suggesting that this standard had been met. *Marsh*, 490 U.S. at 370-74. The Court rejected plaintiffs' view that a reviewing court should examine the evidence afresh, ruling instead that the usual "arbitrary and capricious" standard should apply. *Id.* at 375-78. EMR suggests that the current circumstances are a "fair parallel" to those in *Marsh*. Petitioner's Br. at 36.

The FCC argues strenuously that it satisfied the "hard look" requirement, but we need not resolve that issue. In *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), the Court declined to apply *Marsh* where the federal action in question was approval of a land use plan. Unlike the dam in *Marsh*, that "action" was complete when the new information was received. *Id.* at 2384-85. Presumably later actions pursuant to the plan might be significant enough to require NEPA filings, just as some FCC actions relating to RF radiation will need new environmental

studies — including, for example, the circumstances where the current regulations call for such studies. But the regulations having been adopted, there is at the moment no "ongoing" federal action, *id.* at 2385, and no duty to supplement the agency's prior environmental inquiries.

Thus we review the Commission's rejection of EMR's petition as we would agency rejection of any petition to initiate a rulemaking. Such a decision is to be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). As applied to refusals to initiate rulemakings, this standard is "at the high end of the range" of deference, see *American Horse*, 812 F.2d at 4-5, and an agency refusal is overturned only in the "rarest and most compelling of circumstances," *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981).

EMR argues that the Commission's refusal to undertake a rulemaking constitutes an improper delegation of its NEPA duties to private organizations and government agencies. Indeed, in formulating its RF regulations, and in deciding whether to re-open the issue, the Commission has relied on other government agencies and non-governmental expert organizations with specific expertise on the health effects of RF radiation. See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 8 FCC Rcd 2849, 2849, ¶ 1 (1993). EMR says this is improper, citing cases requiring that a federal agency maintain responsibility for the final conclusion of an EIS. See, e.g., *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (agency may not rubberstamp a consultant-prepared EIS); *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 960 (1st Cir. 1976); *Sierra Club v. Lynn*, 502 F.2d 43, 58-59 (5th Cir. 1974); see also *Communities Against Railway Expansion, Inc. v. FAA*, 355 F.3d 678, 686 (D.C. Cir. 2004).

The Commission appears not to have abdicated its responsibilities, but rather to have properly credited outside experts. It found that the Institute of Electrical and Electronic Engineers (a non-profit entity with members from government, industry, and the academy), and the "federal agencies and their personnel that participate in its committees and subgroups," are "composed of leading experts in this area," and that there was "no other comparable group of experts with which to consult or upon which to rely." 18 FCC Rcd at 16826, ¶ 10. EMR does not contest these propositions. In upholding the earlier decision not to tighten regulation on account of non-thermal effects, the Second Circuit rejected a claim that the Commission had improperly relied on expert standard-setting organizations. *Cellular Phone Taskforce*, 205 F.3d at 90. Moreover, as the Environmental Protection Agency is "the agency with primacy in evaluating environmental impacts," *id.* at 91, the FCC's decision not to leap in, at a time when the EPA (and other agencies) saw no compelling case for action, appears to represent the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts. See, e.g., *American Horse*, 812 F.2d at 4. Finally, the Commission's determination to keep an eye on developments in other expert agencies suggests that here, as in *Cellular Phone Taskforce*, the Commission has an adequate "mechanism in place for accommodating changes in scientific knowledge." 205 F.3d at 91.

In what is at a minimum in "tension" with its abdication claim, EMR asserts that the Commission has also violated its duty to coordinate with other federal agencies to facilitate NEPA's environmental goals. See 40 C.F.R. §§ 1500.5(b), 1501.1(b). In any event, the argument was not presented to the Commission and therefore we may not address it. 47 U.S.C. § 405; see also *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003).

EMR's submissions implicitly raise one of the strongest potential bases for overturning an agency's refusal to initiate a rulemaking — that "a significant factual predicate of a prior decision on the subject . . . has been removed." *WWHT*, 656 F.2d at 819; see also *American Horse*, 812 F.2d at 5; *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). EMR suggests that the studies it submitted (after the decision of the Office of Engineering & Technology) show that exposure to RF radiation is unsafe at levels too low to cause thermal effects. But the articles submitted are nothing if not tentative. One, for example, hypothesizes a mechanism by which cell phone radiation might promote cancer, but also notes that "[t]o date, there is limited scientific evidence of health issues, and no mechanism by which mobile phone radiation could influence cancer development." Peter W. French et al., *Mobile Phones, Heat Shock Proteins and Cancer*, 67 Differentiation 93, 93 (2000). We find nothing in those studies so strongly evidencing risk as to call into question the Commission's decision to maintain a stance of what appears to be watchful waiting.

In its reply brief EMR tries to shore up its factual case by offering additional reports of possible non-thermal risks. As the reports were not submitted to the Commission before it acted, they cannot be a basis for overturning the order. 47 U.S.C. § 405; see also *AT&T Wireless Services, Inc. v. FCC*, 365 F.3d 1095, 1101 (D.C. Cir. 2004). The Commission's motion to strike one of these references is dismissed as moot.

As the Commission's decision not to initiate an inquiry neither violated NEPA nor was otherwise an abuse of discretion, the petition for review is

Denied.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1336 September Term, 2004

Filed On: February 11, 2005 [877431]

EMR Network,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

(3)

Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

No. 04-1515

In The

Supreme Court Of The United States

EMR NETWORK,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

Amicus Curiae Brief Of the State Of Connecticut In Support Of Petitioner EMR Network's Petition for Writ Of Certiorari

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Questions Presented for Review by Petitioner

1. Does the Federal Communications Commission have an affirmative duty to develop evidence and to supplement the record in a proceeding before it to avoid "acting ignorantly when intelligent action is possible"----as expressed in the Second Circuit landmark decision in *Scenic Hudson.*

2. Does the Congressional mandate to the Federal Communications Commission to act "in a manner consistent with the public interest" in the deployment of broadband and other advanced wireless services require the FCC to determine the effect of its action on the environment and human health? (47 U.S.C. Sec 157)

3. Does the exclusive regulatory authority assigned to the Federal Communications Commission to set human exposure guidelines for RF Radiation--- pre-empting all State and Local Governments--- obligate the FCC to regularly review and update those guidelines? (47 U.S.C. Sec 332(c)(7)(B)(iv))

4. Does the National Environmental Policy Act (NEPA) impose a "continuing responsibility" on the FCC to use all practicable means to assure safe and healthful surroundings for all Americans when carrying out it statutory functions? (42 U.S.C. Sec. 4331 *et seq.*)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

EMR NETWORK

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA

Respondents

On Petition for Writ Of Certiorari

Amicus Curiae Brief Of the State Of Connecticut In Support Of Petitioner EMR Network's Petition for Writ Of Certiorari

INTEREST OF THE AMICUS CURIAE

The State of Connecticut by Richard Blumenthal, its Attorney General, submits this brief pursuant to Supreme Court Rule 37.4 in support of petitioner EMR Network's petition for certiorari from the decision of the United States Court of Appeals for the District of Columbia denying EMR Network's petition for review of an order of the Federal Communications Commission (hereinafter "the Commission"). The State of Connecticut is presented with numerous applications for the siting of telecommunications towers and infrastructure. Among the numerous applications received by the state, the state has received applications for the siting of cell phone towers on a church property, on the front lawn of a house, and on a hospital property. There is a substantial reason to be concerned about the health effects of electromagnetic radiation and the emerging science must be examined in greater detail. Without greater understanding of the emerging science, the state is making siting decisions without the comfort of knowing that its citizens are safe.

The Telecommunications Act of 1996 prohibits the State from making its own informed decisions about the safety of communication towers. The state is prohibited by 47 U.S.C. Sec. 332(c)(7)(B)(iv) from denying an application if the communication facility complies with the Commission's regulations concerning the environmental effects of radio frequency emissions. In other words, the state may not deny an application based on emerging and credible science showing the harm of radiofrequency radiation, as it is otherwise permitted to do under its state

laws, if the Commission's outdated standards are met. Only the Commission may change its rules to permit a more protective standard; yet, the Commission has rejected a request to examine the science to ensure that its rules are protective. If a federal agency has the awesome power to preclude states from setting more protective environmental and health standards based on the most credible science available at the time an application is submitted to the state, the federal agency must use every available opportunity to ensure that its standards are based on the best and most current science possible.

SUMMARY OF ARGUMENT

The state of Connecticut is precluded from exercising its police power to protect the health and welfare of its citizens from the effects of radiofrequency radiation by 47 U.S.C. Sec 332(c)(7)(B)(iv), which gives the Commission exclusive power to regulate the environmental effects of radio frequency emissions. The FCC procedures allow it to conduct inquiries into matters over which it has jurisdiction. 47 CFR Sec. 1.430. When the pre-emptive authority to regulate with respect to the environmental effects of radio frequency emissions rests exclusively with the Commission, it is arbitrary and capricious for the Commission to reject petitions for inquiries into such matters because, according to the Commission, there are other agencies better suited to conduct such inquiries.

ARGUMENT

THE PRE-EMPTIVE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION OVER STATE GOVERNMENTS' ABILITY TO SET HUMAN EXPOSURE GUIDELINES OBLIGATES THE FCC TO REVIEW AND UPDATE THOSE GUIDELINES REGULARLY

The State of Connecticut is precluded from rejecting an application for a telecommunications tower that in its estimation will be harmful to the public health or environment if the applicant is in compliance with FCC standards. Absent the pre-emptive effect of 47 U.S.C. Sec. 332(c)(7)(B)(iv), Conn. Gen. Stat. Section 16-50p permits Connecticut's siting agency to consider the

> nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including, but not limited to, electromagnetic fields that, whether acting alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological balance, public health and safety....

The Telecommunications Act eliminates the state's ability to use its state powers to reject an application because it believes the radio frequency emissions to be harmful to its citizens as long as the applicant meets the radio frequency standards set by the Commission. 47 U.S.C. Sec. 332(c)(7)(B)(iv).

In denying EMR's petition for a Notice of Inquiry under FCC rules, 47 CFR Sec. 1.430, based on its determination that it is not the most appropriate forum to initiate such an inquiry, the Commission has abdicated its responsibilities. The FCC Order rejecting EMR's request finds:

> EMR had requested that we initiate a proceeding to gather information and opinion about the need to revise our current guidelines for evaluating human exposure to RF emissions from transmitters under the

> jurisdiction of the Commission. We find that OET was correct in dismissing the petition, having determined that *this Commission is not the most appropriate forum to initiate such an inquiry or proceeding concerning the environmental effects of RF radiation at this time.*

(Emphasis added.) (A-1—A-2).

The Commission's rejection of the request for inquiry based on a determination that it was not equipped to handle questions of environmental effects of radiation is an act in dereliction of its responsibilities, especially in light of its preemptive powers. The Commission is mandated to encourage the deployment of telecommunications technology "in a manner consistent with the public interest." 47 U.S.C. Sec. 157. It has already issued rules based on the thermal effects of radiofrequency radiation. Like it or not, the Commission cannot hold the power to preempt state regulation of environment effects of radiofrequency radiation, and then refuse to inform itself of the need to tighten controls because it is not the "right" agency to do so. The agency's determination on this point was arbitrary and capricious.

CONCLUSION

The Court should grant certiorari to review the arbitrary and capricious action of the Federal Communications Commission in refusing to grant the EMR's request for inquiry under the FCC rules on the biological health and environmental effects of radiofrequency radiation.

Respectfully submitted,

State of Connecticut

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(2)

Supreme Court, U.S.
FILED
JUN 7 - 2005
OFFICE OF THE CLERK

No. 04-1515

IN THE
Supreme Court of the United States

EMR NETWORK,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, the International Association of Fire Fighters, AFL-CIO, CLC, ("IAFF") hereby requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia. Petitioner EMR Network has consented to the filing of this brief. Respondents Federal Communication Commission ("FCC" or "Commission") and United States of America have not consented.

As set forth in the accompanying brief, the IAFF is the leading advocate for fire fighter health and safety in North America, representing more than 267,000 full-time professional fire fighters and paramedics. The IAFF, as well as its members and affiliates, have a unique and significant interest in the growing use of fire and rescue service facilities as base stations for wireless telecommunications towers and antennas, the exposure of IAFF members at those stations to low-intensity radiofrequency and microwave radiation emitted from these wireless telecommunications towers and antennas, and the potential effects of such exposures on the health of IAFF members.

The IAFF is greatly concerned that the Court of Appeals' decision affirming the FCC's dismissal of EMR Network's petition requesting the Commission to initiate an inquiry on the need to revise its regulations will deprive IAFF members of the research and regulatory oversight that is needed on this issue. Accordingly, the IAFF respectfully requests leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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BRIEF OF *AMICUS* CURAIE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The International Association of Fire Fighters ("IAFF"), AFL-CIO, CLC, the leading advocate for fire fighter health and safety in North America, is headquartered in Washington, D.C., and represents more than 267,000 full-time professional fire fighters and paramedics. More than 2,900 affiliates protect the lives and property of over 80 percent of the continent's population in nearly 6,000 communities in Canada and in every state of the United States.

Since its inception close to a century ago, the IAFF has taken an active role in protecting the health and safety of the public at large through the efforts of its members and affiliates in preventing and fighting fires, providing life support and medical assistance to victims of natural disasters, fires, violent crimes and terrorist attacks, and containing and reducing exposures to toxic chemicals and other contaminants posing a threat to the health and safety of North America's communities. The IAFF has also been in the forefront of supporting and advancing public policies that enable North America's communities to better prevent and respond to all manner of threats to the public health and safety, from building and forest fires to structural collapses, chemical spills and terrorism.

Central to the IAFF's mission of protecting the safety and health of the public is ensuring that its members, who risk life and limb in support of this vital mission on a daily basis, are able to report to their fire and rescue stations secure in the knowledge that, while their jobs are inherently dangerous, their workplaces are safe. Unsafe fire and rescue stations also pose a serious risk to the health and safety of the public at large, insofar as injuries and illnesses among fire fighters and

paramedics caused by workplace exposures to environmental toxins ultimately hinder the ability of first responders to provide vital fire and rescue services to the communities they are pledged to serve.

In this regard, the IAFF has become increasingly concerned by the growing number of cellular towers and other wireless telecommunications mechanisms that are being placed on the roofs of fire stations and other fire and rescue facilities. This concern is understandable, given that IAFF members are required to work at fire and rescue stations harboring telecommunications towers and antennas for shifts regularly lasting 24 hours or more, and are therefore being exposed to the low-intensity radiofrequency (RF) and microwave (MW) radiation[1] emitted by the telecommunications towers and antennas to a much higher degree than the general population.

In August 2004, the membership of the IAFF adopted a Convention Resolution[2] opposing the use of fire stations as base stations for towers and/or antennas that conduct cellular telephone transmissions until a study with the highest scientific merit and integrity on the health effects of exposure to low-intensity RF/MW radiation is conducted and, in connection therewith, it is proven that the use of fire stations and other fire and rescue facilities for cellular tower and/or antenna base stations poses no health risk to IAFF members. The membership of the IAFF is increasingly exposed to low-intensity RF/MW radiation through the growing use of fire and rescue facilities as base stations for wireless telecommunications towers and antennas. The IAFF, therefore, has a unique interest in the outcome of this case.

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[1] "Low intensity RF/MW radiation" exposure is exposure that does not raise the temperature of the cells of the human body.

[2] IAFF Resolution No. 15, August 2004.

BASIS FOR *AMICUS'S* SUPPORT OF PETITION

The arguments and interests of Petitioner EMR Network are well presented and expressed in its petition and will not be further elaborated upon here. The IAFF fully supports Petitioner's view regarding the need for the Federal Communications Commission ("FCC") to conduct additional studies on the health effects of prolonged exposure to low-intensity RF/MW radiation, to promulgate the results of such studies and, if found necessary, to formulate and implement regulations that protect the public from such exposures and mitigate the adverse health effects thereof.

It is the general position of the wireless telecommunications industry that exposure to low-intensity RF/MW radiation does not pose a risk to human health unless the intensity of the radiation is sufficient to heat body tissue. It is important to note, however, that this belief is based on non-continuous exposures by the general public to low-intensity RF/MW radiation emitted from wireless telecommunications base stations. Furthermore, most studies that form the basis for this belief are at least five years old and generally focus on the health effects of cellular telephone use and not, as would be examined by the study Petitioner has urged Respondent to undertake, the potential health effects of low-intensity RW/MW radiation on those working and living in close proximity to wireless telecommunications towers and/or antennas.

IAFF members who work in stations upon which these towers and antennas are placed have particular reason to be concerned about any potential risk of such exposure. Unlike the general public, our members are required to sleep, eat and otherwise reside at these locations so they are always prepared to respond to emergencies.

As previously referenced, the IAFF's membership adopted a resolution at its 2004 Convention calling for further scientific study on the health risks of using fire stations and other fire and rescue facilities for cellular towers and/or antenna base stations. This resolution was enacted, in part, because some IAFF members who work out of fire and rescue facilities used as wireless telecommunication tower and antenna base stations have reported experiencing migraine headaches, extreme fatigue, disorientation, slowed reaction time, vertigo, vital memory loss, and attention deficit amidst life-threatening emergencies, and are concerned that the onset of these conditions was related to the activation of the wireless telecommunications towers and/or antennas on and around the fire and rescue service facilities from which they work.

The IAFF notes the voluminous body of scientific research and literature cited by Petitioners from the record of this case suggesting grounds for these concerns, and will let this record speak for itself. Pursuant to its Convention resolution, the IAFF is also investigating funding for a study, to be conducted among IAFF members in the United States and Canada, to determine whether the use of fire stations and other fire and rescue facilities as cellular telephone base stations poses a health risk to IAFF members. The study would compare and contrast illnesses experienced by fire fighters and paramedics working out of facilities with cellular telephone towers and/or antennas with those of fire fighters working out of facilities without such towers and/or antennas, and would focus on the effects of long-term exposures to low-frequency RF/MW radiation on the central nervous and immune systems of fire fighters and paramedics.

In the meantime, however, the IAFF strongly believes that its members should not be required to live with doubts as to whether their exposure to low-intensity RW/MW radiation

is subjecting them to risks beyond those related to their already risky professions. The IAFF therefore strongly supports the Petitioner EMR Network's Petition for Writ of Certiorari, and believes that the Respondent FCC should be required to take a closer look at the effect, if any, of low-intensity RF/MW radiation on the health of those who live and work under or around wireless telecommunications towers and antennas.

CONCLUSION

For the foregoing reasons and those presented by Petitioner EMR Network, the Petition for a Writ of Certiorari should be granted.

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